UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

SELUX CORPORATION

and Case No. 3-CA-123429

LOCAL 363, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO

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DECISION

Statement of the Case

LAUREN ESPOSITO, Administrative Law Judge. Based upon a charge in Case No. 3-CA-123429, filed on March 3, 2014, and amended on April 3, 2014, April 22, 2014, and May 22, 2014 by Local 363, International Brotherhood of Electrical Workers, AFL-CIO ("Local 363" or "the Union"), a Complaint and Notice of Hearing (the "Complaint") issued on May 30, 2014. The Complaint alleges that Selux Corporation ("Selux" or "Respondent"), violated Sections 8(a)(1) and (5) of the Act by laying off a manufacturing technician employee without providing the Union with an opportunity to bargain, and by bypassing the Union and dealing directly with a bargaining unit employee regarding a severance package. Respondent filed an Answer denying the Complaint's material allegations. This case was tried before me on August 25, 2014, in Poughkeepsie, New York.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the arguments of the parties made at trial and in their post-hearing briefs, I make the following

Findings of Fact

I. Jurisdiction

At all times material to the complaint's allegations, Respondent has been a corporation with an office and place of business in Highland, New York, engaged in the business of manufacturing lighting components. Respondent admits and I find that at all material times it has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. Respondent admits and I find that at all material times Local 363 has been a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Respondent's Operations and The Collective Bargaining Relationship

Respondent manufactures lighting components at its Highland, New York facility, employing over 100 employees, who perform assembly and other varieties of manufacturing work. Peter Stanway is Respondent's CEO, and Ellen Anderson has been its Director of Human Resources since May 2012. Respondent admits and I find that at all material times, Stanway and Anderson were supervisors within the meaning of Section 2(11) of the Act, and agents of Respondent acting on its behalf within the meaning of Section 2(13). Anderson testified at the hearing.

Since approximately 1994, Local 363 has represented a bargaining unit of all production and maintenance employees at the Highland, New York facility, excluding office and professional employees, guards, watchmen, and all supervisory employees as defined in the Labor Management Relations Act of 1947. Selux and Local 363 have been parties to a series of collective bargaining agreements establishing the terms and conditions of employment for these employees, the most recent of which is effective by its terms from January 1, 2012 through December 31, 2014.

In addition to the bargaining unit employees, there are temporary employees employed by a separate agency that work at Selux's facility. The number of temporary employees fluctuates in order to accommodate the work load. Although temporary employees are laid off with some regularity, Selux had never laid off a bargaining unit employee prior to the layoff of Rockfeler Eleazard, discussed below.

Samuel Fratto, Local 363's Business Manager, organized the bargaining unit employees at Selux to be represented by the Union in 1994, and has negotiated collective bargaining agreements with the company since that time. Steve Neugebauer, Local 363's Assistant Business Manager, has also been involved with enforcement and administration of the union contract at the Selux facility. Fratto and Neugebauer both testified at the hearing.

B. The Layoff of Rockfeler Eleazard

Rockfeler Eleazard began working for Selux in 2002 as an assembler, and also performed work in Selux's warehouse. Eventually, Eleazard became part of a group of four employees working on the manufacture of a product called Eutrack, a piece of metal track capable of incorporating spotlights and other fixtures. Some time during 2013, Selux decided to assign only one employee to perform all of the Eutrack work, and Eleazard was chosen because of his extensive manufacturing background. After that point, Eleazard worked exclusively on Eutrack, with other employees called in to provide assistance at Eleazard's request.

Anderson testified that in December 2013, Selux retained a consultant called Fala Technologies to evaluate the efficiency of various aspects of its operations. According to Anderson, Fala Technologies concluded that the floor space devoted to the Eutrack production line could be better used for other Selux products, and therefore recommended that the Eutrack production be relocated. Anderson testified that she first learned that the Eutrack work might be relocated, and Eleazard's position eliminated as a result, in December 2013. However, she stated that at that point she did not consider whether Eleazard could be moved to another position at the facility, because the relocation of the Eutrack work "was just an idea" (Tr. 126).

Subsequently, Anderson called Fratto to discuss the relocation of the Eutrack work and a possible layoff of Eleazard. Although Fratto and Anderson both testified that this telephone conversation occurred, they differed with respect to its timing and, in some respects, content. While Fratto testified that the conversation took place some time in December 2013, Anderson said that she called Fratto after she received an e-mail from Stanway in early February 2014 definitively stating that the Eutrack production would be relocated and Eleazard laid off.[1]

Fratto testified that Anderson began the conversation by stating that Selux was not making money with Eutrack, and might have to do something with it. Fratto testified that this did not concern him, as product lines had been eliminated before and such issues were not the Union's concern unless the bargaining unit was affected. Anderson then told Fratto that because of the elimination of the Eutrack line the company might have to lay off Eleazard. Fratto testified that he told Anderson that the company had assigned Eleazard to make that specific product, and the elimination of the product line did not necessarily mean that Eleazard should be laid off. In particular, Fratto told Anderson that Eleazard had 11 years seniority.[2] He pulled out the collective bargaining agreement, and read Anderson excerpts from its seniority provision, Article 6, emphasizing the Union's position that the contract's reference to "the regular rules of seniority" included layoffs. According to Fratto, Anderson did not respond. Fratto continued that the Eutrack work being performed by Eleazard was assembly work, and that Eleazard was capable of performing other assembly work at the plant.[3] Fratto stated that in his opinion the company didn't like Eleazard. Anderson responded that Eleazard made too much money to be moved back into another assembly position. Fratto then suggested that Anderson ask Eleazard whether he would return to another assembly position at a lower wage rate. Fratto emphasized, however, that if Eleazard contacted the Union, the Union would take the position that under the collective bargaining agreement Eleazard was entitled to receive the same wage rate in another assembly position that he earned working on the Eutrack line. Fratto testified that he also raised the issue of temporary employees during the conversation. Fratto told Anderson that there were currently 20 temporary employees working at the facility, and that the temporary employees, intended to supplement the bargaining unit workforce, should be laid off prior to the layoff of any bargaining unit employees. Fratto testified that Anderson never provided any specific date for the elimination of Eutrack production or any layoff of Eleazard during this conversation. Nor did he and Anderson discuss announcing the cessation of the Eutrack production to the employees, how Eleazard would be notified of any layoff, or any terms of Eleazard's severance.

Anderson, by contrast, testified that during their telephone conversation she informed Fratto that Selux would be relocating the Eutrack production, eliminating Eleazard's position, and "laying someone off" (Tr. 114). According to Anderson, Fratto responded, "it's because you don't like him," and Anderson countered that Selux had no position appropriate to Eleazard's compensation and skill set. Fratto then suggested that Anderson offer Eleazard a lower paying job which Eleazard would find unacceptable, "and then you'll be done with him." Anderson declined to do so, and Fratto responded, "All right, we'll just see what happens." Anderson testified that she could not recall providing Fratto with specific dates for the Eutrack line

[1] Anderson also testified that when she called the Union's office she ended up speaking with Fratto because when she initially asked to speak to Neugebauer, she was told that he was out of the office with the flu. Neugebauer testified that he was out of the office for a week because of the flu around December 9 and 10 of 2013 (Tr. 155-156).

[2] Eleazard was one of the ten most senior bargaining unit employees at the facility (Tr. 102, 133-134).

[3] Anderson confirmed that Eleazard could have performed assembly work and other bargaining unit positions in the facility (Tr. 138-139).

relocation or Eleazard's layoff, even though, according to Anderson, a date for the layoff had already been set at the time of the conversation.

The parties did not discuss these issues again until Eleazard was laid off on February 17, 2014. Eleazard testified that at around 9:15 a.m. that day the production manager directed him to go to Stanway's office, where he met with Stanway and Anderson. Eleazard testified that he asked whether he was in trouble. Stanway said that he was not in trouble, but was being laid off that day because Eutrack was not making enough money. Eleazard protested, and asked Stanway whether he was going to listen to Anderson and let him go. Eleazard said that he would go back to work and give Stanway some time to think, but Anderson repeated that he was laid off, telling him to go home and he would be paid for the rest of the day. Anderson told Eleazard that the Union had agreed to the layoff, so Eleazard asked to speak to a union representative. Anderson then called Neugebauer, and Eleazard asked him to come to the plant because he was being laid off. Neugebauer responded that because no discipline was being imposed there was no need for him to be present. Stanway then directed Eleazard to collect his things and leave.

Stanway and Anderson also gave Eleazard a written severance agreement during the meeting. Eleazard testified that Stanway and Anderson asked him to sign the severance agreement, and Anderson testified that Eleazard was told to take it to the Union for review. The severance agreement provided for two months' salary as severance benefits, in addition to the two weeks' pay that Eleazard was entitled to pursuant to Article 17 of the collective bargaining agreement. The severance agreement also provided that Eleazard waived any claim for reinstatement to his position, and that Eleazard would not seek employment at Selux in the future. Eleazard reviewed the severance agreement with the Union, and declined to sign it.[4]

Anderson provided a similar account of this meeting and the interaction with Neugebauer during her testimony. Anderson testified that Eleazard seemed very surprised that he was being laid off. She denied, however, telling Eleazard during the meeting that the Union had agreed to the layoff. She stated that when she called Neugebauer, Neugebauer said that Fratto had told him about the layoff.[5] Eleazard was never offered other assembly work at a lower pay rate.

The Union filed a grievance alleging that Eleazard's layoff violated the seniority provisions of the collective bargaining agreement. The parties held a third step grievance meeting the week after the layoff, but the grievance has not been resolved, and the Union has demanded arbitration.

III. Analysis and Conclusion

A. Respondent Violated Sections 8(a)(5) and (1) of the Act by Laying Off Eleazard Without Providing Local 363 with Notice and the Opportunity to Bargain

Section 8(d) of the Act requires that employers and bargaining representatives "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and

[4] At the hearing, Selux amended its Answer to admit the Complaint's allegation at Paragraph VIII that "About February 17, 2014, Respondent, by Peter Stanway and Ellen Anderson bypassed the Union and dealt directly with an employee in the Unit by offering a custom severance package to the employee."

[5] Neugebauer testified that as of February 2014 he had heard that Eutrack was not making money and that a layoff was possible, but nothing definite had been decided.

conditions of employment," which are mandatory subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Section 8(a)(5) provides that an employer's failure to do so violates the Act. An employer therefore violates Section 8(a)(5) when it makes changes in such terms and conditions of employment without providing the bargaining representative with notice and the opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736, 742 (1962). It is well-settled that layoffs constitute a mandatory subject of bargaining, and an employer that lays off employees without providing the union with notice and the opportunity to bargain violates Section 8(a)(5). See, e.g., *Pan American Grain Co.*, 343 NLRB 318, 338 (2004), vacated, 448 F.3d 465 (1st Cir. 2006); *SPX Corp.*, 333 NLRB 875, fn. 1 (2001); *Kajima Engineering & Construction*, 331 NLRB 1604, 1618-1620 (2000).

There is no dispute here that Selux was required to bargain with Local 363 regarding Eleazard's layoff. General Counsel contends that Selux laid off Eleazard without providing Local 363 with the opportunity to bargain. Specifically, General Counsel argues that Anderson's statements during her telephone conversation with Fratto were too ambiguous and indeterminate to constitute bargaining or an offer to bargain regarding Eleazard's layoff, or to engender an obligation on the Union's part to demand bargaining in lieu of having inaction be construed as a waiver of its right to bargain. Selux contends that based upon the totality of the circumstances the evidence establishes that it bargained in good faith with Local 363 during Anderson and Fratto's telephone conversation. Selux argues that Anderson's statements to Fratto regarding Eleazard's layoff were concrete and definite, as opposed to hypothetical, and that good faith bargaining ensued.

The evidence here does not establish that Selux provided Local 363 with adequately definitive, concrete notice of Eleazard's layoff, such that bargaining could occur or the Union was even required to demand that bargaining take place. The Board has repeatedly held that a union is required to demand bargaining regarding an impending change in terms and conditions of employment only after the employer provides it with notice of a definite decision which it intends to execute at a specific time. It is well-settled that an employer contending that a union has waived its right to bargain has the burden to prove a "clear relinquishment" of that right. *Sierra International Trucks*, 319 NLRB 948, 950 (1995), citing *NLRB v. Challenge-Cook Bros*, 843 F.2d 230, 233 (6th Cir. 1988); *Oklahoma Fixture Co.*, 314 NLRB 958, 960 (1994), enf. denied, 79 F.3d 1030 (10th Cir. 1996). Thus, the Union is not required to demand negotiations in order to risk avoiding a waiver of the right to bargain unless the employer provides notice of a specific, definite change in terms and conditions of employment.

The union's obligation to demand bargaining is therefore only engendered "by a clear announcement that a decision affecting the employees' terms and conditions of employment has been made and that the employer intends to implement this decision." *Oklahoma Fixture Co.*, 314 NLRB at 960-961. By contrast, an "inchoate and imprecise announcement of future plans about which the timing and circumstances are unclear" is insufficient to trigger the union's obligation to demand bargaining. *Id.* at 961 (internal quotations omitted); *see also Centurylink*, 358 NLRB No. 134 at p. 2 (2012), appeal dismissed, 2014 WL 1378759 (D.C. Cir. 2014); *San Juan Teachers Assn.*, 355 NLRB No. 28 at p. 5-6 (2010). The prior notice provided by the employer must "afford the union a reasonable opportunity to evaluate the proposals and present counter proposals" prior to implementation. *Pan American Grain Co.*, 343 NLRB at 318; see also *Gannett Co.*, 333 NLRB 355, 357 (2001). Thus the Board has found that employer statements formulated in ambivalent or indefinite terms are insufficient to trigger a union's responsibility to demand bargaining in lieu of having its inaction construed as a waiver. See *San Juan Teachers Assn.*, 355 NLRB No. 28 at p. 5-6 (employer description of reduction in hours as "one of the options," "more strategic," and a course of action that the employer was "going to have to take a look at" insufficiently specific to require a bargaining demand); *Pan*

American Grain Co., 343 NLRB at 318, 338 (statement that employer "intended to continue with staff reductions in the future" inadequate notice of layoff); *Oklahoma Fixture Co.*, 314 NLRB at 960-961 (employer's announcement that it was "considering" subcontracting insufficient to require bargaining demand). The Board has also stated that unions are not required to demand bargaining "at any point before the Respondent confirm[s] that the decision [will] be implemented on a specific date." *Centurylink*, 358 NLRB No. 134 at p. 2.

Selux has not satisfied this standard, in that the evidence here does not establish that Anderson provided Fratto with clear notice that Selux had decided to lay off Eleazard during their telephone conversation. In particular, the evidence does not establish that Anderson provided Fratto with a specific date for Eleazard's layoff. Anderson testified that at the time of her telephone conversation with Fratto, Selux had determined a specific date for Eleazard's layoff. She further testified that in her opinion the Union was "absolutely" entitled to such important information, the date for the first layoff of any bargaining unit employee (Tr. 127-129). However, when asked whether she provided Fratto with a specific date for Eleazard's layoff, or with a date for the relocation of the Eutrack production, she responded, "I don't believe so" (Tr. 128-129). Anderson then went on to claim that she could not remember whether or not she provided Fratto with a specific date for the layoff of Eleazard or the relocation of the work (Tr. 129-130). Aside from this change in her testimony with respect to such a critical issue, it is inherently implausible that if Anderson believed, as she testified, that the definite date of Eleazard's layoff was important information to which the Union was entitled, she would have such a feeble recollection of having conveyed it. As a result, the evidence does not establish that Selux "confirmed" with Local 363 that Eleazard's layoff "would be implemented on a specific date," and the Union was not required to demand bargaining. *Centurylink*, 358 NLRB No. 134 at p. 2.

I also find that the evidence overall does not support Anderson's contention that she communicated to Fratto that Selux had arrived at a definitive decision to relocate the Eutrack work and lay off Eleazard. In this regard, I ultimately find Fratto's account of their telephone conversation more credible than Anderson's. Fratto's account of the conversation was the more detailed and specific, indicating that his testimony was more reliable. The conclusion that Anderson did not provide Fratto with a definite date for the layoff of Eleazard, or even the relocation of the Eutrack production, supports a finding that at the time that Anderson and Fratto spoke Selux had not reached any final decision. I note that Anderson's testimony that Neugebauer was not in the Union office when she called and ultimately spoke to Fratto coincides with Neugebauer's testimony that he was out of the office due to illness in early December 2013, and not in February 2014, when Anderson contends that Selux's final decision was made (Tr. 155-156). Any discussion of the relocation of the Eutrack production and a consequent layoff in December 2013 would necessarily have been hypothetical, as opposed to definitive, because, according to Anderson, at that point Eleazard's layoff was "just an idea" (Tr. 126). I also find it significant that Anderson took or prepared no notes for such an important conversation (Tr. 130) – in which, she claimed, she informed the Union of the first-ever layoff of a bargaining unit employee – and that there are no e-mails or documents memorializing Selux's decision or its communications with the Union. For all of the foregoing reasons, I find it more probable that Fratto and Anderson's conversation took place in December 2013, and that Anderson's remarks regarding the relocation of the Eutrack work and ensuing layoff of Eleazard were speculative in character. Consequently, the Union was not required to demand bargaining in the face of such "future plans about which the timing and circumstances are unclear." *Centurylink*, 358 NLRB No. 134 at p. 2; *Pan American Grain Co.*, 343 NLRB at 338.

Finally, the surrounding circumstances also indicate that Fratto's description of the telephone conversation regarding Eleazard's potential layoff is more credible than Anderson's.

As discussed above, there were no e-mails or documents exchanged between Selux and the Union regarding Eleazard's layoff, other than the severance agreement given to Eleazard at the February 17, 2014 layoff meeting. This state of affairs is contrary to the parties' previous practice in bargaining mid-term contract issues, including mid-term negotiations in which Anderson participated (G.C. Ex. 9). Respondent also admits that it bypassed the Union and dealt directly with Eleazard by presenting him with the severance agreement. In addition, Anderson, who became Director of Human Resources in May 2012, displayed a lack of knowledge with respect to the parties' previous relationship which casts doubt upon her credibility with respect to the parties' collective bargaining relationship overall. For example, Anderson testified that she had never seen written agreements regarding a shared work program and a compressed work schedule for bargaining unit employees (Tr. 132, 146, 148-149, G.C. Ex. 6, 8). Indeed, it appeared from Anderson's testimony that she had not reviewed, or was not even aware of, all of the Memoranda of Understanding or other agreements comprising the parameters of the collective bargaining relationship between the parties (Tr. 131-133).[6] As a result, I find her a less than reliable witness overall.

For much the same reasons, I do not find that the evidence establishes that Anderson and Fratto engaged in actual bargaining during their telephone conversation, as Selux claims. The cases cited by Selux in support of its argument that the Complaint should be dismissed because it engaged in good-faith bargaining all address allegations that the employer engaged in bad-faith or surface bargaining. *General Electric Co.*, 150 NLRB 192, 192-196 (1964), enf'd., 418 F.2d 736 (2d Cir. 1969); *Genstar Stone Products*, 317 NLRB 1293, 1293-1294 (1995); *NLRB v. Suffield Academy*, 322 F.3d 196, 198-199 (2nd Cir. 2003); *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1380-1382 (8th Cir. 1993); *NLRB v. Billion Motors, Inc.*, 700 F.2d 454, 456 (8th Cir. 1983). Such a violation of Section 8(a)(5) is distinct from a theory that the employer unlawfully made unilateral changes in terms and conditions of employment without providing the union with notice and the opportunity to bargain.[7] In any event, here the lack of a definitive announcement regarding the layoff of Eleazard and the date and manner of its implementation, as discussed above, effectively precludes any actual bargaining from having taking place. I do not find that Fratto's contract-based arguments regarding Eleazard's seniority and pay rate, and his assertions regarding the temporary non-bargaining unit employees, justify an inference that Anderson provided Fratto with definite information regarding Eleazard's layoff or that bargaining occurred, as Selux argues. Such interjections are not incompatible with a discussion of the layoff on a hypothetical level; indeed, Fratto testified that he told Anderson that given the temporary employees working at the facility *any* layoff of bargaining unit employees was inappropriate. Furthermore, the legal analysis set forth above places the onus on the employer to articulate its plans in a definitive manner before actual bargaining can begin. Nor do I find it significant that Fratto did not argue that Selux refused to bargain regarding Eleazard's layoff in connection with the Union's grievance alleging that the layoff violated the collective bargaining agreement. The claim that Selux violated contractual seniority provisions when it laid off Eleazard is a legally distinct contention being addressed in a different forum.

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[6] I also note that Anderson had no previous experience with labor unions, and had never held a human resources position involving a collective bargaining relationship (Tr. 128).

[7] Thus, contrary to Selux's contention, anti-union animus is irrelevant, in that an employer's unlawful unilateral change in terms and conditions of employment constitutes a *per se* violation of Section 8(a)(5). See *NLRB v. Katz*, 369 U.S. at 743. Of course, unlawful unilateral changes may constitute part of the totality of the circumstances considered by the Board in order to determine whether an employer engaged in unlawful bad-faith or surface bargaining, in a case involving such an allegation. See, e.g., *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).

For all of the foregoing reasons, the evidence establishes that Local 363 did not waive its right to bargain regarding Eleazard's layoff, and that Anderson and Fratto's telephone conversation did not constitute bargaining. As a result, Selux laid off Eleazard without providing Local 363 with notice and the opportunity to bargain, in violation of Sections 8(a)(5) and (1) of the Act.

B. Respondent Violated Sections 8(a)(5) and (1) of the Act by Bypassing Local 363 and Dealing Directly with Eleazard Regarding a Severance Package

At the hearing, Selux amended its Answer to admit the Complaint's allegation at Paragraph VIII that "About February 17, 2014, Respondent, by Peter Stanway and Ellen Anderson bypassed the Union and dealt directly with an employee in the Unit by offering a custom severance package to the employee." In order to establish unlawful direct dealing, the Board considers whether the employer communicated directly with union-represented employees in order to establish or change terms and conditions of employment or "undercut" the union's role as collective bargaining representative, and whether the communications at issue were made without notice to or excluding the union. See, e.g., *Hotel Bel-Air*, 358 NLRB No. 152 at p. 1-2, 7 (2012).

The evidence establishes that during their meeting with Eleazard on February 17, Stanway and Anderson gave him a proposed agreement providing for two months' severance pay in addition to the two weeks' severance pay required under the collective bargaining agreement. The severance agreement also required that Eleazard waive any claim for reinstatement and forego seeking employment with Selux in the future. The Board has found that direct communications with bargaining unit employees regarding such issues, without notice to or involvement of the union, constitute direct dealing in violation of Sections 8(a)(5) and (1) of the Act. See, e.g., *Hotel Bel-Air*, 358 NLRB No. 152 at p. 1-2 (letter offering severance terms directly to bargaining unit employees); *Northeast Beverage Corp.*, 349 NLRB 1166, 1169, fn. 1, 1195 (2007), enf'd. in relevant part, 554 F.3d 133 (D.C. Cir. 2009) (offer of lump sum payment conditioned on agreement to forego employment at new facility); *Alwin Mfg. Co.*, 326 NLRB 646, 648, 691 (1998), enf'd., 192 F.3d 133 (D.C. Cir. 1999) (offer of lump sum payment in exchange for waiver of reinstatement and all legal claims against Respondent). As a result, I find that Selux violated Sections 8(a)(5) and (1) of the Act by bypassing the Union and offering Eleazard a custom severance package directly.

Conclusions of Law

1. The Respondent, Selux Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 363, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, Local 363, International Brotherhood of Electrical Workers, AFL-CIO, has been the exclusive collective bargaining representative of the following appropriate unit of employees for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, but excluding office and professional employees, guards, watchmen, and all supervisory employees as defined in the Labor Management Relations Act of 1947.

4. By laying off Rockfeler Eleazard without providing Local 363 with notice and the opportunity to bargain, Selux violated Sections 8(a)(1) and (5) of the Act.

5. By bypassing Local 363 and directly offering Eleazard a custom severance package and agreement, Selux violated Sections 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Selux has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Selux laid off Eleazard without providing the Union with notice and the opportunity to bargain, Selux will be ordered to bargain regarding the decision to lay off Eleazard and its effects, and to reinstate Eleazard and make him whole for any loss of pay or other benefits suffered as a result of the unlawful layoff. *Ebenezer Rail Car Services*, 333 NLRB 167, fn. 5 (2001), citing *Lapeer Foundry & Machine*, 289 NLRB 952 (1988); see also *Eugene Iovine, Inc.*, 356 NLRB No. 134 (2011) and 353 NLRB No. 36, fn. 4 (2008) (2-member Board). The make whole remedy shall be computed on a quarterly basis from the date of the layoff to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds, 647 F.3d 1137 (D.C. Cir. 2011). Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. *Latino Express, Inc.*, 359 NLRB No. 44 (2012). Respondent shall also compensate Eleazard for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than one year. *Tortillas Don Chavas*, 361 NLRB No. 10 (2014). Finally, Respondent shall be ordered to post a notice informing its employees of its obligations herein.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER

The Respondent, Selux Corporation, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Laying off bargaining unit employees without first giving the Union adequate notice of its intention to do so, and without affording the Union an opportunity to bargain in good faith regarding the layoff and its effects.

(b) Bypassing the Union and dealing directly with bargaining unit employees regarding their wages, hours, and other terms and conditions of employment, by directly offering them a custom severance package and agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union concerning the decision to lay off Rockfeler Eleazard on February 17, 2014 and the effects of that decision.

(b) Within 14 days of this Order, reinstate Rockfeler Eleazard to his previous job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make whole Rockfeler Eleazard for any loss of pay or other employment benefits suffered as a result of its unlawful conduct, plus interest, in the manner set forth in the Remedy portion of this Decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy or such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post its Highland, New York facility copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site and/or other electronic means if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 17, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated: Washington, DC November 21, 2014

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Lauren Esposito
Administrative Law Judge

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain with Local 363, International Brotherhood of Electrical Workers, by laying off employees without providing the Union with notice and the opportunity to bargain.

WE WILL NOT bypass the Union and deal directly with bargaining unit employees by directly offering them a custom severance package and agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL at the request of the Union, bargain in good faith with the Union as the exclusive collective bargaining representative regarding the layoff of Rockfeler Eleazard and its effects.

WE WILL within 14 days of the date of the Board's Order, offer Rockfeler Eleazard reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make Rockfeler Eleazard whole for any loss of earnings and other benefits suffered as a result of his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Rockfeler Eleazard for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than one year.

SELUX CORPORATION

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Leo W. O'Brien Federal Building

Clinton Ave and N Pearl Street, Room 342

Albany, New York 12207-2350

Hours: 8:30 a.m. to 5 p.m.

518-431-4155.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03-CA-123429 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.